

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA**

INDECK KEYSTONE ENERGY LLC,)	
)	
Plaintiff/)	
Counter-defendant,)	
)	Civil Action No. 04-325 Erie
v.)	
)	Judge Sean J. McLaughlin
VICTORY ENERGY OPERATIONS)	
LLC,)	
)	
Defendant/)	
Counter-plaintiff.)	

**DEFENDANT’S MOTION FOR PRE-TRIAL FINDING THAT PLAINTIFF’S
MISAPPROPRIATION OF TRADE SECRETS CLAIMS CANNOT BE BASED
ON ALLEGED COPYING OF LANGUAGE INCLUDED IN
PROPOSALS OR DRAWINGS THAT IKE PLACED IN THE PUBLIC DOMAIN**

Introduction

Defendant Victory Energy Operations, LLC (“VEO”), pursuant to L.R. 16.1.4(E)(3), moves for entry of a pre-trial finding that Counts IV (Pennsylvania Uniform Trade Secret Act), V (Unfair Competition), and VI (Unjust Enrichment) of Plaintiff Indeck Keystone Energy LLC’s (“IKE’s”) Complaint cannot be based on VEO’s alleged copying of language that was included in proposals or drawings that IKE placed in the public domain. In support of its motion, VEO states as follows:

1. In each of Counts IV (Pennsylvania Uniform Trade Secret Act), V (Unfair Competition), and VI (Unjust Enrichment) of IKE’s Complaint (collectively, “Misappropriation Claims”), IKE alleges that VEO misappropriated Keystone Trade Secrets, Keystone Software, the Keystone trademark, and Keystone Images.

2. To the extent that these claims are based upon VEO's alleged copying of language that IKE included on proposals or language that IKE placed in the public domain, IKE's claims cannot be maintained.

3. It is undisputed that the proposals and drawings that form the basis of VEO's claims were provided by IKE's predecessors to potential customers as a matter of course. (Dep. of Plaintiffs' Rebuttal Expert, Martin Swabb, pp. 168-169).

4. Pennsylvania courts have long recognized that a party cannot seek recovery for misappropriation of trade secrets or confidential information where the allegedly confidential information has been disseminated publicly or disclosed by virtue of the public sale of the product at issue. *Van Products Co. v. General Welding and Fabricating Co.*, 419 Pa. 248, 267, 419 A.2d 79, 779-80 (1965) (recognizing that "the publication and advertising [of allegedly secret information regarding air driers], and the public sale of the air driers destroyed [the plaintiff's] right to maintain a cause of action upon a breach of a duty not to disclose its 'trade secrets.'").

5. The only misappropriation tort in Pennsylvania is misappropriation of trade secrets. *Pytko v. Van Allen, Jr.*, 1992 U.S. Dist. LEXIS 7956 (E.D. Pa. June 9, 1992).

6. Therefore, IKE cannot base any of its Misappropriation Claims upon VEO's alleged copying of language included in drawings or proposals that IKE placed in the public domain.

WHEREFORE, Defendant Victory Energy Operations, LLC, requests that this court issue a pre-trial finding, pursuant to L.R. 16.1.4, that Counts IV (Pennsylvania Uniform Trade Secret Act), V (Unfair Competition), and VI (Unjust Enrichment) of IKE's Complaint cannot be based upon VEO's alleged copying of language included in drawings or proposals that IKE placed in the public domain.

Dated: April 20, 2007

Respectfully submitted,

/s Christopher T. Sheean
One of the Attorneys for Defendant,
VICTORY ENERGY OPERATIONS, LLC

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CERTIFICATE OF SERVICE

Christopher T. Sheean, an attorney, certifies that on the 20th day of April, 2007, he caused a copy of the foregoing ***Defendant's Motion for Pre-Trial Finding That Plaintiff's Misappropriation of Trade Secrets Claims Cannot Be Based On Alleged Copying of Language Included in Proposals or Drawings That IKE Placed In the Public Domain*** to be filed electronically, and that the CM/ECF system for the court will e-mail a copy of the foregoing to the following counsel of record:

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/s/ Christopher T. Sheean
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